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No. 118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner, Charles Ralph Johnston, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in the above entitled cause on February 9, 1950, upon which a petition for rehearing was denied on March 10, 1950, and respectfully represents to this Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This case involves an interpretation of Rule 25(c) of the Federal Rules of Civil Procedure, relating to the motion of this petitioner to be substituted as party plaintiff

under a "transfer of interest" in the form of an absolute and outright conveyance of one-third of certain stock claimed by the original plaintiff in a proceeding *in rem.* This transfer of interest was made by the original plaintiff prior to the time the suit was filed in the District Court, and such interest later was transferred to petitioner subsequent to the filing of the proceeding *in rem.*

The ultimate question is whether the provisions of Rule 25(c) shall be limited by three novel conditions, none of which is actually contained in Rule 25(c) as now promulgated, to the effect that:

(1) The transferee may not be substituted under Rule 25(c) if the original transfer was not made *pendente lite* by the original party plaintiff, but was made prior to the time the suit was filed.

(2) The transferee may not be substituted under Rule 25(c) if his motion to be substituted is not filed prior to the time when the action otherwise would be dismissible under Rule 25(a)(1), even though the transferee's motion is made prior to the entry of any order of dismissal thereunder.

(3) The transferee may not be substituted under Rule 25(c), unless he is a transferee of the entire title to the property or chose in action sued for by the original party plaintiff.

Petitioner maintains that the imposition of each of the three foregoing restrictive conditions upon the operation of Rule 25(c) is in direct conflict with a decision or decisions in other Courts of Appeals on the same matter; and also creates a conflict upon a Federal question, that is, the proper interpretation of Rule 25(c) of the Federal Rules of Civil Procedure, which the Court of Appeals for the Seventh Circuit has interpreted in a manner probably

in conflict with applicable decisions of this Court. Petitioner further maintains that the imposition of each of the three foregoing conditions upon the operation of Rule 25(c) raises an important question of Federal law which is not already settled by this Court, and which should be settled upon this appeal.

Petitioner therefore asserts that this Petition for Certiorari falls squarely within the purview of Rule 38(5)(b) of this Court, and accordingly should be allowed.

This case comes before this Court upon a very simple record. Plaintiff, Reka Goldberg Hofheimer, brought an action *in rem* to recover 1,500 shares of preferred and 4,500 shares of common stock of The Hump Hair Pin Manufacturing Company (less 20 shares of preferred and 50 shares of common stock delivered to her shortly before her suit was filed on November 29, 1941) (Tr. 3-5). The defendants were alleged to be express, resulting, and constructive trustees for plaintiff of said 1,500 shares of preferred and 4,500 shares of common stock (Tr. 5). Plaintiff sued to have proper certificates evidencing such stock issued and delivered to her (Tr. 5-6), and for all income, proceeds and avails thereon to which she was entitled as the owner thereof up to the date of the issuance and delivery of such stock certificates to her (Tr. 6).

Defendants moved to strike the complaint for failure to state a cause of action (Tr. 13-14), the sole grounds alleged being that plaintiff's claim was barred by laches and limitations and by reason of certain bankruptcy proceedings (Tr. 14).

On September 24, 1941, two months before she filed her suit, plaintiff assigned 500 shares of preferred and 1,500 shares of such common stock to her attorney, Harold M. Keele (Tr. 17-23). Her attorney having entered the Armed Forces of the United States, and while plaintiff's said

suit was *pendente lite* in the District Court, he assigned said 500 shares of preferred and 1,500 shares of common stock to this petitioner on September 25, 1942 (Tr. 23-24).

On January 27, 1945, the original plaintiff, Reka Goldberg Hofheimer, died; but her death was not suggested to the District Court until June 17, 1947 (Tr. 14). On that day, plaintiff's prior death having been suggested of record, defendants moved that the cause of action be dismissed for failure of a successor or a representative of the deceased plaintiff to be substituted for her, such motion being made pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure (Tr. 14-15), citing *Anderson* v. *Yungkau,* 329 U. S. 482.

On July 25, 1947, before this motion had been acted upon, this petitioner filed his motion under Rule 25(c) to be substituted as a party plaintiff, and that the suit proceed in petitioner's name either as the sole plaintiff or as a co-plaintiff (Tr. 16-25). Petitioner's moving papers and amended pleading were all in accordance with Rule 25(c), and clearly stated that petitioner was "the sole and absolute legal and equitable owner" of the 500 shares of preferred stock and 1,500 shares of common stock previously assigned to him (Tr. 18-19).

On February 4, 1948, the District Court denied petitioner's motion to be substituted as transferee under Rule 25(c), granted defendants' motion to dismiss, and ordered that the cause be finally dismissed (Tr. 32).

Petitioner thereupon perfected his appeal to the United States Court of Appeals for the Seventh Circuit, which subsequently affirmed the District Court's order of final dismissal (Tr. 51). The principal ground stated in the Court of Appeals' opinion was that petitioner was not the transferee of the entire *res* involved (Tr. 50). The opinion also held that the District Court had no jurisdiction to

permit petitioner's substitution as transferee, because the motion to be substituted under Rule 25(c) was not based upon a transfer *pendente lite* (Tr. 51), and was not made before the action became dismissible as to the original plaintiff for failure of her representative to continue the prosecution of the litigation within the two-year period permitted by Rule 25(c), as construed by the *Anderson* v. *Yungkau* case (Tr. 49-50).

BASIS FOR JURISDICTION OF THIS COURT.

This Court's jurisdiction is invoked pursuant to Title 28, U. S. Code, Section 1254.

THE QUESTIONS PRESENTED.

I.

Whether a transferee *pendente lite,* but whose assignor became a transferee prior to the filing of an action *in rem,* may be substituted under Rule 25(c).

II.

Whether a transferee may be substituted under Rule 25(c) at any time prior to the actual dismissal of the proceeding in the District Court, even though such action is dismissible (but has not actually been dismissed) under Rule 25(a)(1).

III.

Whether a transferee by an absolute assignment of a part of the *res* sued for by the original plaintiff in an action *in rem* may be substituted under Rule 25(c), even though such transferee does not claim to be the assignee of the entire *res* involved.

REASONS FOR ALLOWANCE OF WRIT.

I.

It was unequivocally held by the Fifth Circuit Court of Appeals in *Dryden* v. *Land Investment Co., Inc.*, 127 F. 2d 586, that a transferee may be substituted under Rule 25(c), even though the original assignment to the transferee occurred prior to the filing of the action.

It is impossible to reconcile the interpretation of Rule 25(c) by the Fifth Circuit in the *Dryden* case with the opinion of the Seventh Circuit in the case at bar.

II.

It was unequivocally held by the Fourth Circuit in *Hood* v. *Bell*, 84 F. 2d 136, in a unanimous opinion written by Judge Parker, that even though an action is dismissible in the District Court, it is reversible error for the District Court to enter an order dismissing the same after a transferee has moved to be substituted for a party litigant prior to the time the order of dismissal was entered.

It is impossible to reconcile the interpretation of Rule 25(c) by the Fourth Circuit in the *Hood* case with the opinion of the Seventh Circuit in the case at bar.

III.

The language of the instrument of absolute assignment under which petitioner claims to be the absolute owner of 500 shares of preferred and 1,500 shares of common stock constituting part of the *res* involved in this action *in rem* is that Reka Goldberg Hofheimer, the original plaintiff,

> "does hereby grant, bargain, sell, convey, assign, set over, transfer and deliver"

the said 600 shares of preferred and 1,600 shares of common stock "now owned by her" (Tr. 21).

Defendants made no motion under Rule 12 of the Federal Rules of Civil Procedure to require the joining of Harold M. Keele as original assignor; or of this petitioner as subsequent assignee, under Rule 17, requiring that "every action shall be prosecuted in the name of the real party in interest."

This Court held in Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, and in Edward B. Marks Music Co. v. Jerry Vogel Music Co., 140 F. 2d 266, that the failure of the defendants to make a seasonable objection to the non-joinder of the original or subsequent assignee constituted a waiver thereof. Moreover, it was held in Kardo Co. v. Adams, 231 Fed. 950, that it is reversible error for the District Court to raise this objection on its own motion and to dismiss the action.

Further, in *Talmadge* v. *U. S. Shipping Board*, 54 F. 2d 240, and many other cases, it has been held that an assignment, absolute in form (as is each assignment in this case), passes full title to the assignee for purposes of suit, even though the assignee holds such title as security. See *Barnes* v. *Alexander*, 232 U. S. 117; *Brown* v. *Fletcher*, 235 U. S. 589, 237 U. S. 583; *Western Powder Mfg. Co.* v. *Brewerton Coal Co.*, 81 F. 2d 85, cert. den. *Cent. Ill. Elec. & Gas Co.* v. *Mfrs. Fin. Co.*, 299 U. S. 549.

Similarly, it has been held that the holder of an equitable lien may sue to enforce the same, even though such holder is not the owner of the entire *res* involved. *See Walker* v. *Brown*, 165 U. S. 654; *Fourth Street Nat. Bank* v. *Yardley*, 165 U. S. 634; and *Haas* v. *Rendleman*, 62 F. 2d 701, cert. den. 289 U. S. 750. These cases also hold that a partial assignee may sue in his own name, the other interested parties being then subject to being joined if

required by the District Court under Rule 19 of the Federal Rules of Civil Procedure. (*See Dulles* v. *Crippen Mfg. Co.*, 156 F. 706; *Chase Nat. Bank* v. *Sayles*, 11 F. 2d 948, cert. den. 273 U. S. 708; *Rogers* v. *Pennobscot Mining Co.*, 154 F. 606.)

Perhaps it should also be added that it has always been the law that an allegation of absolute ownership is held to be sufficient in and of itself as an allegation of fact. *O'Keefe* v. *Cannon*, 52 Fed. 898; *George Adams & Frederick Co.* v. *South Omaha Nat. Bank*, 123 F. 641; *In re Noble*, 21 Fed. Supp. 840; *Foss* v. *People's Gas Light Co.*, 241 Ill. 238.

It is impossible to reconcile the holding in the opinion of the Court of Appeals in the case at bar, that petitioner has no right of intervention under Rule 25(c) because "he is not the owner of the entire *res* involved," with the decisions of this Court and the several Courts of Appeal in the foregoing cases.

This Court granted certiorari in the *Anderson* v. *Yungkau* case (329 U. S. 482) solely for the reason that it involved an interpretation of Rule 25(a) of the Federal Rules of Civil Procedure. Certiorari has been granted in many other cases involving interpretation of the Federal Rules. In the case at bar, not only is Rule 25(c) squarely before this Court for interpretation; but the Court of Appeals' opinion sought to be reviewed herein purports to engraft three novel conditions upon that Rule, which are in direct conflict with the decisions of other Courts of Appeals on the same matters, as well as in conflict on Federal questions with applicable decisions of this Court. This appeal, moreover, involves an important question of Federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET
Attorneys for Petitioner.

IN THE

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OCTOBER TERM, 1949.

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Respondents.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

OPINIONS BELOW.

The District Court did not prepare or publish a formal opinion. The opinion of the Court of Appeals has not yet been published; but appears in the Transcript of Record at pages 47 to 51.

JURISDICTION.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to a consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 1 to 5 of our Petition for Writ of Certiorari, above, and for brevity is not here repeated.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in not reversing the order of dismissal by the District Court, and directing that petitioner be substituted as party plaintiff.

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c), unless the original transfer was made *pendente lite*.

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c) after a motion for dismissal has been made under Rule 25(a), even though no order of dismissal had been entered prior to the transferee's application under Rule 25(c).

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c), unless he is the owner of the *entire res* involved.

ARGUMENT.

I.

The case of *Dryden* v. *Land Investment Co., Inc.*, 127 F. 2d 586, by the Fifth Circuit Court of Appeals, squarely holds that a transferee under an assignment made prior to the filing of the original action, not *pendente lite*, may nevertheless be substituted under Rule 25(c).

There is nothing in Rule 25(c) which limits the right of a transferee to be substituted thereunder merely because such transferee acquired his interest *pendente lite* from a prior transferee whose rights arose by an original assignment made before the filing of the original action. To impose such a condition upon the operation of Rule 25(c) in defiance of the *Dryden* case is an arbitrary limitation of Rule 25(c) which does not accord with the meaning or purpose thereof. No valid ground was stated in the Court of Appeals' opinion for arbitrarily inserting such a condition in Rule 25(c). The theory of the Federal Rules of Civil Procedure is that they will do essential justice between the parties; and will not deprive any litigant of his day in court upon any such narrow and technical ground as the imposition of the condition here referred to.

In view of the square conflict on this point, between the opinion and decision in the *Dryden* case and the opinion of the Court of Appeals in the case at bar, it is submitted that certiorari should be allowed by this Court.

II.

An examination of Rule 25(c) will show with equal clarity that there is no language therein which justifies the District Court in dismissing an action when, as in the case at bar, the transferee has moved under proper pleadings to be substituted under Rule 25(c) before the entry of any order of dismissal and while the case is still pending and undetermined in the District Court.

The decision in *Hood* v. *Bell,* 84 Fed. 2d 136, Fourth Circuit, by Judge Parker speaking for a unanimous court, is squarely to the effect that even though an action is dismissible, nevertheless it is reversible error for the District Court to enter an order of dismissal if the transferee has made his motion for substitution prior to the time the order of dismissal was entered, as in the case at bar. The Court of Appeals for the Seventh Circuit, in the instant case, argues in a circle when it says that the order to dismiss should be entered under Rule 25(a), as interpreted by this Court in *Anderson* v. *Yungkau,* 329 U. S. 482, merely because *after such order of dismissal was entered* the District Court "had, *thereafter,* no jurisdiction."

Again petitioner urges upon this Court that it is improper to restrict the applicability of Rule 25(c) upon any such narrow, technical ground as this, when the Rule contains no such limitation whatever.

In any event, the square conflict between the unanimous opinion of the Fourth Circuit by Judge Parker in the *Hood* case and the opinion of the Seventh Circuit in the case at bar is a conflict which justifies the issuance of the writ of certiorari upon this application under Rule 38 (5)(b) of this Court.

III.

In the light of the Federal authorities cited in our Petition for Certiorari, under Point III of the Reasons for Allowance of Writ above, it is unnecessary to again cite the same authorities at this point in this argument.

This Court and the Courts of Appeal have repeatedly held that *a partial assignee by an outright instrument of assignment,* or an absolute assignee for purposes of security, or even the holder of no more than an equitable lien, may sue to enforce his contractual rights in a *res* which is the subject of an action *in rem,* even though he is not the owner of the entire *res* involved and is not an assignee of the whole *res.* The opinion of the Court of Appeals for the Seventh Circuit in the instant case holds directly contrary (Tr. 50) to these decisions, cited under our said Point III.

This is a fundamental error which cannot be supported by any decisions of the Federal Courts, so far as petitioner is aware. Again this misinterpretation of Rule 25(c) by the Seventh Circuit, which is based upon such error, falls squarely within the purview of Rule 38(5)(b) of this Court, and justifies the granting of the petition for the writ of certiorari upon this application.

CONCLUSION.

The true and proper construction of Rule 25(c), like the true and correct construction of the other Federal Rules of Civil Procedure, especially in an appeal from an opinion of a Court of Appeals which purports to deny a right to a party litigant upon jurisdictional grounds which do not appear in the Federal Rules, is a matter which amply justifies this Court in allowing certiorari in this case.

Moreover, as we have shown above, not one of the three novel conditions engrafted by the Seventh Circuit upon Rule 25(c) as the ground for denying the District Court's jurisdiction in this action is supported by any decision of any other Court of Appeals or of this Court. Finally, as we have shown above, each of such conditions so imposed is in direct conflict with cases previously decided in this Court and in the other Courts of Appeals.

In order that there may be a proper construction of Rule 25(c) of the Federal Rules of Civil Procedure, and also in order that there may be uniformity in the holdings of the Federal Courts as to jurisdictional grounds, this Court should grant to this petitioner the writ of certiorari to review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

CHARLES RALPH JOHNSTON,
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

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Respondents.

RESPONDENTS' OPPOSING BRIEF.

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THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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RESPONDENTS' OPPOSING BRIEF.

STATEMENT OF THE CASE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The facts are adequately stated in the opinion of the court below. However we restate some of the facts for the purpose of adding the record citations.

Reka Goldberg Hofheimer (hereinafter called plaintiff) filed her complaint November 29, 1941 (Tr. 2) nearly nine years ago, alleging an oral trust created in November, 1914 whereby Sol H. Goldberg agreed to hold certain stock of Hump Hair Pin Manufacturing Company in trust for her. The amended and supplemental complaint, filed December 10, 1942, alleges plaintiff "is lawfully and beneficially en-

titled'' to this stock (Tr. 5). On an appeal from an order denying a temporary injunction, the Circuit Court of Appeals, 7th Circuit, in *Hofheimer* v. *McIntee*, 40 F. (2d) 363, affirmed on December 15, 1943 and the opinion (J. Minton) says, p. 366: ''The denial of a motion for a temporary injunction, based upon a verified complaint alone, was certainly no abuse of discretion, *where the complaint did not state a cause of action* or any facts showing irreparable injury'' (Emphasis ours).

On September 24, 1941, two months before the suit was begun, plaintiff entered into an agreement with Harold M. Keele whereby she retained him to prosecute her claims and file this suit (Tr. 19). She agreed to pay Keele a contingent fee equal to one-third of the recovery (Tr. 21). ''To insure payment of said contingent fee'' she assigned one-third of the stock ''owned at law or in equity'' by plaintiff (Tr. 21), and one-third of the recovery. Keele agreed ''to bring and prosecute all legal and other proceedings in the name of the client'' (Tr. 20); to execute pleadings, affidavits and other documents ''in the name of the client'' (Tr. 20); to collect every judgment ''rendered in favor of the client'' (Tr. 22), and to prosecute any appeal ''rendered against the client'' (Tr. 22). If the attorney failed to collect, he was to reassign the stock to client (Tr. 22). This agreement was assigned by Keele to Johnston, petitioner, on September 25, 1942 (Tr. 23).

QUESTIONS PRESENTED.

Not one of the three questions presented in the Petition for Certiorari, p. 5, forms the basis for the decision of the Court below, except possibly point II. The Court below held that since more than two years elapsed after the death of the sole plaintiff, the case must be dismissed under Rule 25(a)(1) in accordance with the decision of this Court in *Anderson* v. *Yungkau,* 329 U. S. 482, and accordingly petitioner could not be substituted as a party plaintiff.

ARGUMENT.

Since this case had to be and was dismissed pursuant to Rule 25(a)(1), it is unnecessary to enter into a theoretical argument concerning the interpretation of Rule 25(c) on the basis of the questions framed by the petitioner. Nevertheless we shall meet the questions as presented by the petitioner.

I.

Whether a Transferee Pendente Lite, But Whose Assignor Became a Transferee Prior to the Filing of an Action In Rem, May Be Substituted Under Rule 25 (c).

On proposed Question I, petitioner says that the opinion of the Court of Appeals is in conflict with *Dryden* v. *Land Investment Co., Inc.*, 127 F. (2d) 586. There is no conflict. In the *Dryden* case Dryden and Todd joined in a petition to annul a tax title acquired in 1933. It was filed January 5, 1939. It alleged that Dryden had conveyed the property to Todd October 24, 1938. This deed was not recorded until February 14, 1939. The defendant contended that Dryden could not recover because he alleged title out of himself, and Todd could not recover because he did not have title at the time of the filing of the suit. This was based on a provision of the Louisiana Code that a deed is wholly ineffective as to third persons until recorded. The court held title must have been in either Dryden or Todd, and since both joined in the petition relief could be granted. Then the court said this about Rule 25(c):

> "If the recording of the deed after the suit was filed be viewed as transferring the right at that date, Rule 25(c) provides for an amendment joining or substituting the transferee."

That is to say, that since the transfer of the interest took place at the recording of the deed on February 14, 1939, which was subsequent to the filing of the petition on January 5, 1939, it was a transfer *pendente lite,* and therefore a transfer within the meaning of Rule 25(c). The opinion of the Court in this case is not in conflict with that holding.

II.

Whether a Transferee May Be Substituted Under Rule 25(c) At Any Time Prior to the Actual Dismissal of the Proceeding in the District Court, Even Though Such Action Is Dismissable (But Has Not Actually Been Dismissed) Under Rule 25(a) (1).

In the case of *Anderson* v. *Yungkau,* 329 U. S. 482, this Court held that Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the Court to dismiss an action not revived within the two year period. Pursuant to this rule defendants moved to dismiss the case and a month later petitioner moved, among other things, to be substituted as the sole plaintiff in the case. Petitioner's argument is to the effect that he may be substituted as the plaintiff under Rule 25(c) even though the case must be dismissed under Rule 25(a)(1) because of the death of the sole plaintiff. Petitioner says, Petition 6, that it is impossible to reconcile the Court's ruling with *Hood* v. *Bell,* 84 F. 2d 136. There is no conflict between the *Hood* case and the Court's opinion. The *Hood* case was decided before the adoption of the Federal Rules of Civil Procedure and did not involve a deceased party. The Court applied the law of North Carolina in accordance with the Conformity Act which was in effect prior to the adoption of the Rules of Civil Procedure. The *Hood* case accordingly did not involve an interpretation of Rule 25(c) of the Federal Rules of Civil Procedure nor as previously stated did

it involve a deceased party nor a mandatory dismissal for failure to substitute.

Rule 25(c) contemplates that the original party be living. Otherwise, the suit could not be continued by or against the original party, nor could the transferee be joined with the original party, as Rule 25(c) provides. The words "original party" as used in this rule necessarily refer to a living party. If a party dies, he becomes a "deceased party," which is the term used in Rule 25(a). The term "deceased party" nowhere appears in Rule 25(c). Only Rule 25(a) provides for substitution of a deceased party. If Rule 25(c) could be said to apply to a deceased party, then it would follow that the rule authorizes an action to be continued by or against a deceased party, for under the rule it is not necessary to substitute or join the transferee. Such an interpretation of the rule is patently unsound.

III.

Whether a Transferee by an Absolute Assignment of a Part of the Res Sued for by the Original Plaintiff in an Action In Rem May Be Substituted Under Rule 25(c), Even Though Such Transferee Does Not Claim to Be the Assignee of the Entire Res Involved.

The Court did not hold, as petitioner claims, that petitioner had no right to intervene because "he is not the owner of the entire *res* involved." The petitioner sought to adopt Hofheimer's complaint in its entirety to recover the entire *res*, whereas petitioner himself claims no more than one-third thereof. The Court merely held that since he is not the holder of the entire *res*, he could not be substituted as sole plaintiff, but would be limited to intervene as a co-plaintiff except that his failure to intervene within the period of two years after the death of the sole plaintiff made it necessary to dismiss the case.

None of the cases cited by petitioner under his point III is in conflict with the decision of the Court below. It is apparent from petitioner's own analysis of the case that none of them holds that an assignee of part of a *res* may sue to recover the entire *res* or that such an assignee may be substituted for a deceased sole plaintiff who claimed ownership of the entire *res*.

We state again, however, that whether the petitioner was entitled to sue for the entire *res* or only part of the *res* he could not be substituted for the plaintiff because of failure to revive the suit under Rule 25(a)(1) and of the requirement that the suit be dismissed under that rule.

Respectfully submitted,

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OCT 25 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 118

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR REHEARING.

CHARLES RALPH JOHNSTON,
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

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MAY IT PLEASE THE COURT:

Petitioner, by his attorneys, presents herewith his Petition for a rehearing of his Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit, and says:

I.

The Court of Appeals ruling deprives Petitioner of his day in Court solely by reason of its error in interpreting Rule 25(c) of the Federal Rules.

The sole issue on this appeal is whether petitioner is entitled to his day in court. The Court of Appeals ruling denies petitioner that right. Such denial is based entirely upon a misinterpretation of Rule 25(c) of the Federal Rules of Civil Procedure. This Court repeatedly has granted certiorari when an important denial of justice has occurred in the Courts of Appeal where the sole issue involved is an interpretation of the Federal Rules of Civil Procedure. The denial of petitioner's day in court is an important denial of justice, since it affects other future litigants also.

The Circuit Court's misinterpretation of Rule 25(c) is based primarily upon an improper application of this Court's decision in *Anderson* v. *Yungkau,* 329 U.S. 482, which interprets Rule 25(a) exclusively, *and has no applicability whatever to Rule* 25(c). In construing Rule 25(c), the Circuit Court also by judicial fiat, has injected a condition into Rule 25(c) which is not contained in that Rule by any language whatever; and which will result in a substantial denial of justice to petitioner and to other future litigants, by depriving them of their day in court, if certiorari should not be granted by this Court.

The condition so injected into Rule 25(c) requires an intervenor, in an action in the District Court involving a *res,* to claim ownership of or a lien upon the entire *res;* and deprives the intervenor of the right to intervene whenever, as in the instant case, he claims ownership of or a lien upon only a part of the *res.* The Circuit Court er-

roneously has deprived petitioner of his day in court upon the sole ground that he does not claim ownership of or a lien upon the entire *res,* thereby injecting into Rule 25(c) a condition which is neither directly or indirectly contained in said Rule 25(c).

Respondents' Answer (p. 4, 6) concedes that petitioner was deprived of his day in court solely under Rule 25(a), as interpreted by this Court in the *Anderson* v. *Yungkau* case. It is respondents' argument that "since this case had to be and was dismissed *pursuant to Rule* 25(a)(1)" in relation to another litigant, whether petitioner was entitled to his day in court under Rule 25(c) is irrelevant.

The complete answer to this position is that it makes no difference whether the case, as to a litigant other than petitioner, was dismissible under Rule 25(a)(1), since petitioner's right to his day in court under Rule 25(c) persisted and still persists.

The Court of Appeals' denial of petitioner's right to his day in court under Rule 25(c) cannot be justified upon the theory that the case was dismissible as to *an entirely different litigant* under Rule 25(a)(1). Such dismissibility was based upon the death of the other litigant, and the failure (for which petitioner was not responsible) of the legal successors in interest to said deceased litigant to appear in the case within the two-year period prescribed in Rule 25(a) cannot concern petitioner's separate right to his day in court under Rule 25(c).

The case was still pending when petitioner sought his day in court under Rule 25(c); and no valid ground for denying petitioner his day in court under Rule 25(c) appears in the Circuit Court's opinion, except upon the untenable theory that he claimed to be an owner or a lienor of less than the total *res* involved in the litigation.

This Court should not permit the Federal Rules of Civil Procedure to be so far misinterpreted and distorted as to deprive petitioner of his day in court (1) by a misapplication of this Court's opinion in the *Anderson* v. *Yungkau* case construing *only* Rule 25(a), and having *no applicability* to Rule 25(c); and (2) by the improper injection into Rule 25(c) of a requirement that petitioner must claim to be the owner or lienor of the entire *res* involved in the litigation, which condition does not appear in Rule 25(c) either in terms or by implication.

II.

The Court of Appeals ruling is in conflict with other opinions of the Circuit Courts of Appeal.

Petitioner contends that his right to one-third of the *res* sued for in this case was assigned to him *pendente lite* on September 5, 1942 (Tr. 23), which date was *ten months after the suit was filed* on November 29, 1941 (Tr. 2).

Respondents' argument under Point I of their Answer admits that if petitioner was a transferee *pendente lite*, then the rule in *Dryden* v. *Land Investment Co., Inc.*, 127 F. (2d) 586, would apply, holding that a transferee *pendente lite* may have his day in court under Rule 25(c). *Hazeltine Corp.* v. *Kirkpatrick*, 165 F. 2d 683, *Roberts Mining & Milling Co.* v. *Schrader*, 95 F. 2d 522, and *Sanders* v. *Hall*, 75 F. 2d 399, are to the same effect. In the latter case, the transferee became the sole party plaintiff.

Petitioner construed the *Dryden* case to hold that a transferee before suit may have his day in court under Rule 25(c); but if respondents are correct and the *Dryden* case involved a transferee *pendente lite*, then that case would support petitioner's right to his day in court in the instant case, because he did not become transferee until ten months after the suit was filed.

It follows that respondents' denial that there is any conflict between the *Dryden* case as they construe it and the instant case is without merit, since in this case petitioner is a transferee *pendente lite,* and should be granted his day in court under that decision, which conflicts directly with the Circuit Court's decision in the instant case.

Respondents also argued that the case of *Hood* v. *Bell,* 84 F. 2d 136, is not in conflict with the Court of Appeals' decision in the instant case because the *Hood* case was decided before the Federal Rules were adopted and did not involve a deceased party. We have already seen that Rule 25(c) does not involve a deceased party, that being a matter of significance only under Rule 25(a). The date of the adoption of the Federal Rules has nothing to do with the holding in the *Hood* case. The whole point of the *Hood* case was that a transferee *who makes his motion for substitution prior to the time an order of dismissal is entered in the case* is entitled to his day in court therein, *even though the case was subject to a possible order of dismissal at the time the intervenor sought to intervene.* It thus follows that respondents' attempt to distinguish the *Hood* case on irrelevant matters cannot meet petitioner's correct contention that the deprivation of his right to his day in court in the instant case is directly contradictory to the rule in the *Hood* case, *in which the transferee was granted his day in court under circumstances identical to the instant case.*

Petitioner concludes that the square conflict between the unanimous opinion of the Fourth Circuit Court by Judge Parker in the *Hood* case and the opinion of the Seventh Circuit Court in the instant case, upon the very same issue as to whether an intervenor shall be deprived of his day in court if, while the case is still pending, and although subject to possible dismissal, the intervenor's application

actually is made before any order of dismissal is entered, is a conflict which justifies the granting of certiorari under both the meaning and spirit of Rule 38(5)(b) of this Court.

CONCLUSION.

There is no more important right to be protected by the Supreme Court than the right of every litigant, present and prospective, to have his day in court.

Wherefore, petitioner prays that this Court may grant a rehearing and reconsider its order denying certiorari herein.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET
Attorneys for Petitioner.

Certificate.

I hereby certify that I am one of the attorneys for the petitioner in the above entitled cause; and that I am a member of the bar of this Court. I hereby further certify that the foregoing Petition for Rehearing is made in good faith; and in my opinion is well founded in point of law; and is not filed herein for purposes of delay.

HECTOR A. BROUILLET

IN THE

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OCTOBER TERM, 1949.

No. 118

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Respondents.

PETITIONER'S BRIEF SUPPORTING PETITION FOR REHEARING.

I.

Respondents' brief states (p. 1-2) that "Reka Goldberg Hofheimer (hereinafter called "plaintiff") filed her complaint November 29, 1941 (Tr. 2)," and that the assignment of the 500 shares of preferred stock and 1500 shares of common stock to petitioner was made on September 25, 1942, and was therefore made *pendente lite.*

Respondents' argument under Point I is that both *Dryden* v. *Land Investment Co., Inc.,* 127 F. (2d) 586, and "the *opinion* of the Court in this case" (p. 5) hold that a transfer *pendente lite* is "a transfer within the meaning of Rule

25(c)." Petitioner thoroughly agrees that a transfer *pendente lite* requires a substitution under Rule 25(c). See *Hazeltine Corp.* v. *Kirkpatrick,* 165 F. 2d 683; *Roberts Mining & Milling Co.,* v. *Schrader,* 95 F. 2d 522, and *Sanders* v. *Hall,* 75 F. 2d 399, where the transferee became sole party plaintiff.

The *decision,* as distinguished from the *opinion,* of the United States Court of Appeals in the case at bar is therefore in direct conflict with *both* the *Dryden* case and the *opinion* itself, for the reason that, as shown by respondents' opposing brief (p. 1-2), the assignment to petitioner was made on September 25, 1942 (Tr. 23), which was *ten months after the suit was filed* on November 29, 1941 (Tr. 2) and was therefore an assignment *pendente lite* insofar as petitioner's rights are concerned.

Thus it makes no difference if the *Dryden* case involved a transferee *pendente lite* rather than a transferee before suit. The truth is that Rule 25(c) contains *no condition* requiring the party seeking to be substituted to be a transferee before suit or a transferee *pendente lite;* and as we read the *Dryden* case, the Court there so held. That holding is clearly in direct conflict with the *decision* (as distinguished from the *opinion*) of the United States Court of Appeals in the instant case.

II.

Respondents argue (p. 5) under Point II that the case of *Hood* v. *Bell,* 84 F. 2d 136, is not in conflict with the Court of Appeals' opinion in the case at bar, because: "The *Hood* case was decided before the adoption of the Federal Rules of Civil Procedure and did not involve a deceased party." These matters, however, do not go to the issue on which petitioner cited the *Hood* case in his petition.

The whole point of the *Hood* case is that Judge Parker, speaking for a unanimous court, squarely held that it was reversible error for the District Court to enter an order dismissing the case, even though such order of dismissal as to the prior plaintiff was proper, *where the transferee had made his motion for substitution prior to the time the order of dismissal was entered. This was precisely the situation in the case at bar.*

Respondents, in an effort to distinguish the *Hood* case, argue (p. 6) that "Rule 25(c) contemplates that the original party be living."

But there is *no such condition* in Rule 25(c).

Nor is there any provision in Rule 25(c) which incorporates Rule 25(a) into Rule 25(c). The two Rules are completely separate, as respondents correctly say (p. 6).

Rule 25 is divided into four sections headed as follows: (a) "Death"; (b) "Incompetency"; (c) "Transfer of Interest"; and (d) "Public Officers; Death or Separation from Office."

An examination of Rule 25(a) (death provision) shows that the word "substitution" is there used as meaning the substitution of a deceased party by his "successors or [legal] representatives;" and the penalty clause provides that if such "substitution" is not made "by the successors or representatives of the deceased party," then "the action shall be dismissed AS TO THE DECEASED PARTY." (Emphasis added.) Had the Advisory Committee drafting this Rule intended that Rule 25(c) (transfer of interest provision) should include and apply to transferees in interest of a dead party, they surely would have said so, in clear and specific language.

In other words, it is plainly contemplated by Rule 25(a) (death provision) that the "substitution" there referred to

is a substitution in which the duly appointed legal representatives of the deceased party, or his successors in interest resulting from his death, shall have the right, within two years of such party's death, to come in and prosecute or defend the action for the benefit of the estate or the heirs of the deceased party. The only penalty provided in Rule 25(a) (death provision) is that, if this is not done within two years, "the action shall be dismissed AS TO THE DECEASED PARTY." (Emphasis added.)

It will be particularly noticed that there is in Rule 25(a) (death provision), which says that under such circumstances, that is, the death of a party and failure to substitute his legal representatives or heirs within two years, "the action shall be dismissed", no penalty *as to any party other than the deceased party.*

Petitioner's motion for substitution, on the other hand, was made under Rule 25(c) (transfer of interest provision), which expressly provides that "the action may be continued by or against the original party" in the event that there shall be *any* voluntary "transfer of interest," (as distinguished from an involuntary transfer resulting from death of a party); and that in that event the transferee may be "*substituted* in the action or *joined with the original party.*" (Emphasis added.)

Thus the word "substitution" has an entirely different meaning in Rule 25(c) (transfer of interest provision), which has no relation whatever to the death of a party, but relates exclusively to a *voluntary* transfer *inter vivos;* and is not the type of "substitution" which is contemplated under Rule 25(a) (death provision), which relates exclusively to the *involuntary* transfer resulting from the death of a party. The "substitution" contemplated in Rule 25(c) (transfer of interest provision) assumes that the transfer shall be by some *voluntary* means, in contrast to the *in-*

voluntary legal transfer to a decedent's representatives or heirs-at-law referred to in Rule 25(a) (death provision); for in Rule 25(c) it is made plain that if *all* of the transferor's interest has *not* been voluntarily transferred to the transferee, then the transferee shall not be "substituted" for but shall be "*joined with* the original party."

The case of *Individual Drinking Cup Co.* v. *Lily-Tulip Cup Corp.*, 15 F. Supp. 393, clearly supports the foregoing statements. In that case, the plaintiff corporation transferred *pendente lite* its interest to its transferee and then was dissolved; such dissolution being the equivalent of the death of an individual party litigant. It was nevertheless held that the voluntary *transferee pendente* lite was entitled to be substituted for the plaintiff and to continue the litigation. See also *Irving Airchute Co.* v. *Switlik*, 26 F. Supp. 329, *Myers* v. *Canton National Bank*, 109 F. 2d 31, allowing a substitution by a transferee *pendente lite* on appeal to the Circuit Court of Appeals. The *Drinking Cup Co.* case cites and relies upon *Ross* v. *City of Ft. Wayne*, 63 F. 466, which summarizes many earlier cases to the same effect. *George W. Jackson, Inc.* v. *Friedstedt, etc., Co.*, 159 F. 496.

The case of *Anderson* v. *Yungkau*, 329 U. S. 482, *deals exclusively* with Rule 25(a) (death provision); and *has nothing whatsoever to do* with Rule 25(c) (transfer of interest provision). It cannot effectively be argued, therefore, that this Court held in the *Anderson* case that Rule 25(c) (transfer of interest provision) should have incorporated in it by judicial fiat (for the rule actually contemplates no such limitation) a condition to the effect that a transferee in interest cannot be "substituted" or "joined," *unless the transferor is still alive (or, if a corporation, is still undissolved) at the time when the transferee's motion is made, or unless the motion is made within the two-year limitation appearing only in Rule* 25(a) *(death provision).*

Respondent's brief concedes (p. 6) that Rule 25(c) contains no reference whatsoever to the death of a party. It correctly says:

> "The term 'deceased party' nowhere appears in Rule 25(c)."

By this concession it must also be conceded that the *Anderson* case has no applicability to the issue on this appeal.

III.

The whole basis of respondents' argument under Point III (p. 6-7) is that: "The petitioner sought to adopt Hofheimer's complaint *in its entirety* to recover *the entire res*, whereas petitioner himself claims no more than one-third thereof." Respondents then argue (p. 7) that petitioner's cases do not hold "that an assignee of *part* of a *res* may sue to recover *the entire res.*"

These statements are without the slightest foundation in fact. Both "Plaintiff's Amended and Supplemented Complaint, as Further Amended and Supplemented" (Tr. 24-5) and plaintiff's affidavit in support of his motion to be substituted (Tr. 17-24) state flatly that plaintiff is suing only for *his one-third of the stock* originally claimed by Reka Goldberg Hofheimer, the original plaintiff herein. Respondent's amendment to the complaint alleges:

> "This plaintiff [petitioner] is the assignee and owner of an UNDIVIDED ONE-THIRD (1/3) of fifty (50) shares of common, and twenty (20) shares of preferred, stock of, and other interests in, the Hump Hair Pin Manufacturing Company, a West Virginia corporation, and Chain Store Products Corporation, a Delaware corporation, and their respective subsidiaries and affiliates, and certain claims against them, their officers, agents, and others, all of which heretofore were owned by Reka Goldberg Hofheimer, the original Plaintiff herein" (Tr. 24). (Emphasis added.)

Petitioner's affidavit states that petitioner

> "is the sole and absolute legal and equitable owner of an UNDIVIDED ONE-THIRD (1/3) of all the aforesaid common and preferred stock, together with a like proportion of the additional stock claimed by Plaintiff (Reka Goldberg Hofheimer) and of all other of Plaintiff's claims, as set forth in said Amended Complaint" (Tr. 18-19). (Emphasis added.)

The statement in respondents' brief (p. 6-7), that petitioner cannot be substituted *because he claims the whole of the stock* claimed by the original plaintiff, Reka Goldberg Hofheimer, is completely untrue.

All that petitioner claims is *his one-third* of the preferred and common stock assigned to him as transferee *pendente lite,* as the foregoing quotations from petitioner's pleadings incontestably show. Many cases support petitioner's right to become a party and carry on the litigation under such circumstances. *Friedman* v. *Harris,* 158 F. 2d 187; *Kellogg* v. *Winchell,* 273 F. 745; *Woodbury* v. *Andrew Jergens Co.,* 69 F. 2d 49; *Patrick* v. *Leach,* 17 F. 476; *Universal Oil Products Co.* v. *Standard Oil Co. of Ind.,* 1 F. Supp. 612; *Walker* v. *Hartford Realization Co.,* 74 F. 2d 56; *Byram* v. *Miner,* 47 F. 2d 112.

It will be noticed that none of the decisions of this Court and the Circuit Courts of Appeal cited in petitioner's Petition for Certiorari (p. 7-8) are contested by respondents. These cases show that the statements in the opinion of the Court of Appeals in the case at bar, to the effect that petitioner could not be substituted as sole plaintiff because "he is not the owner of *the entire res* involved (Tr. 50)" and because "he was not an assignee of *the whole res* (Tr. 50)", are without the slightest merit, and are in direct conflict with all of the cases cited on pages 7 and 8 of petitioner's Petition for Certiorari.

CONCLUSION.

Respondents do not deny that this Court will grant *certiorari* in cases involving the true and proper construction of the Federal Rules of Civil Procedure, including Rule 25(c), which is the question here involved. Especially will this Court grant *certiorari* where a litigant has been deprived of his day in court upon jurisdictional matters which do not appear in the Federal Rules.

Respondents' brief is soley directed to an effort to show that there is no conflict between the "*opinion*" (as distinguished from the "*decision*") in the case at bar, on the one hand, and the *Dryden* and *Hood* cases, on the other hand. But it is not necessary for petitioner to show any such conflict, although it clearly appears, for the reasons above stated, that such a conflict does exist.

This Court has made it plain that it will grant *certiorari* whenever a proper construction of the Federal Rules of Civil Procedure in general, and particularly Rule 25, as in the *Anderson* case, is involved. Not only is it of utmost importance that there may be uniformity in the holdings of the Federal Courts as to jurisdiction; but this Court's interpretation of the Federal Rules of Civil Procedure in and of itself is sufficiently important to the effective operation of the Federal Rules throughout all the District Courts of the United States to warrant granting *certiorari* in this case.

Wherefore, petitioner respectfully submits that this Court should grant a rehearing and reconsider its order denying *certiorari* herein.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

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RESPONSE TO PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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RESPONSE TO PETITION FOR REHEARING.

The petition for rehearing fails to "state grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented" as required by Rule 33 of this Court. Further, the certificate of counsel supporting the petition for rehearing fails to certify that the petition is restricted to the grounds above specified, as required by Rule 33.

The points set forth in the petition for rehearing and also in the petitioner's supporting brief were made in the petition for certiorari and in the brief supporting that petition, and were answered by respondents in their opposing brief.

For this reason the petition for rehearing should be denied.

Respectfully submitted,

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